United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-6125

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-6125

B
P/S

JOSEPH P. ORNATO,

Plaintiff-Appellant,

-against-

MARTIN HOFFMAN, SECRETARY OF THE ARMY and COMMANDING OFFICER, RESERVE COMPONENTS PERSONNEL,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLANT

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Issue Presented

1. Whether the United States Army failed to adhere to the meaning and intent of AR 601-25 when it denied appellant's application for community hardship exemption on grounds that the community's inability to replace appellant as Director of an emergency paramedic program was due "the internal traits and policies of the New York Metropolitan Area generally and Manhattan specifically. . .", a standard not set forth in the Regulation.

2. Whether the United States Army failed to adhere to its own rules and regulations, and otherwise acted in an arbitrary and irrational manner in denying appellant's application for community hardship exemption where appellant's application was prima facie sufficient under the Regulation, and the record was devoid of any evidence to rebut appellant's essentiality and inability to be replaced as Director of the New York Hospital Paramedic Program.

REGULATIONS INVOLVED

Army Regulation 601-25
Chapter 2, ¶2-19a

a. Request for delay for community essentiality or hardship may be approved for a period not to exceed 6 months (rule 22, table 2-1). This delay may be extended for 6 months, or a maximum of a total of one year in accordance with the provisions of paragraph 2-22. Delay will be granted only when all of the following conditions are met:*

(1) The medical/dental service being performed is essential to the maintenance of health, safety, or welfare in the officer's community.

(2) The service cannot be performed by other physicians/dentists residing in the area.

(3) Prior to the date scheduled to report for active duty, the officer cannot be replaced in the community by another person who can perform the medical/dental service.

(4) There is reasonable assurance that the officer can be replaced in the community within the authorized period of delay.

b. Physicians and dentists who are not at the time of application performing the health service needed by the community or who have never performed on a regular basis in a community which is alleged to suffer hardship are not eligible for delay or exemption.

* * *

4-2. Documentary evidence required. Documentary evidence and/or qualifications required to support a request for delay or exemption are -

* * *

e. Extreme community hardship. Evidence to show that service performed is essential to the maintenance of health, safety, or welfare of the

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* The Government has conceded below that the same provisions apply for exemption from active duty.

applicant's community or the nation and cannot be performed by another person in the community. Application must be motivated by critical national or community need and not for the personal benefit of the applicant. The advice of the Chairman of the National Advisory Committee to the Selective Service may be obtained in unusual cases requiring assistance to determine the essentiality of an applicant (rules 10, 32, 43, 52). Applications from medical and dental participants will be processed in accordance with the provisions of Section IV, chapter 2. For other health professional program participants, see paragraph 2-15b.

* * *

4-3. Exemption. When information and/or documentary evidence reveals that total relief from the requirement to report for AD/ADT is applicable, the member will be granted an exemption and processed in accordance with AR 135-133, AR 135-175, AR 135-178, or NGR 600-200.

Statement of the Case

This case comes to this Court on an expedited appeal from the denial of plaintiff's motion for preliminary injunction by Judge Goettel (A.2).*

Plaintiff is a physician on orders for active duty who, along with New York Hospital, made application for his delay and exemption from active duty by reason of community hardship due to plaintiff's position as Director of the New York Hospital Paramedic Program. Plaintiff initiated this action by service of a complaint and order to show cause seeking preliminary injunctive relief. A temporary restraining order preventing appellees from ordering appellant on to active duty pending resolution of the case was signed by Judge Goettel on August 5, 1976 (A.3). A hearing was held on August 13, 1976 at which time Judge Goettel denied the preliminary injunction but continued the temporary restraining order pending appeal and pending appellant's compliance with an expedited processing of the appeal (A.2). Thereafter, an expedited time schedule was consented to by the parties and approved by the Court of Appeals and appellant remains under benefit of the stay pending determination of this appeal.

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* All references are to the Joint Appendix.

Statement of Facts

Introduction

Appellant is a physician and a member of the Berry Plan who has, since late 1975, been Director of the Paramedic Program at New York Hospital-Cornell University Medical Center in Manhattan, one of the largest hospitals in the City of New York. The paramedic program as developed by appellant is the only 24-hour emergency rescue team in the City of New York capable of dispensing on-the-scene medical care to severe trauma and cardiac arrest victims. Based upon appellant's position, he and New York Hospital jointly made application to the United States Army pursuant to AR 601-25 seeking appellant's delay and/or exemption from entry onto active duty by reason of extreme community hardship (A. 17-52, 57, 80). His application was ultimately denied (A. 53-56, 59).

Appellant brings on this action in order to compel the United States Army to adhere properly to its own regulations in reviewing his application for exemption from active duty. As will be argued below, the Army has failed to apply the standards promulgated by lawful regulation and has otherwise acted in such an arbitrary and irrational manner in consideration of appellant's case as to deny his application and

that of his employer, New York Hospital, of a full and fair hearing as intended by the regulation.

Appellant's Qualifications

Upon graduation from medical school in 1971, appellant enrolled in a program in the U.S. Army known as the Berry Plan. He was deferred until June 1976 in order to complete a residency in cardiology.

While a Fellow in Cardiology at the New York Hospital -Cornell Medical Center in New York City, appellant became interested in the Paramedic Program of New York Hospital. Because of his abilities and qualifications, appellant was ultimately asked to assume full-time directorship of the program, late in 1975, which he did (A. 38-39).

Appellant's credentials make him well-suited for the responsibility of heading the program. He is Board-certified in internal medicine and has completed a two-year Research Fellowship in Cardiology at the New York Hospital Medical Center. He has been an instructor in medicine at the Cornell University Medical Center and is presently an instructor in the Continuing Education Program of the American College of Physicians. He is also an instructor for the New York Heart Association in cardio-pulminary resuscitation and in the basic and advanced

life-support programs of the American Heart Association. In addition, appellant has had extensive experience in the emergency treatment of trauma and in the administration of emergency rooms of major city hospitals. Appellant has also had experience in the organization and administration of hospital programs as a result of his work in organizing the Cardiac Rehabilitation Program at Cornell University Medical Center. (See Curriculum Vitae of Plaintiff, A. 22-23). In addition, appellant has now had 10 months' experience in the Paramedic Program and, as will be discussed below, has made significant contributions to it.

The New York Hospital Paramedic Program

1. Community Need for the Program

The Paramedic Program of New York Hospital is unique in the New York City area. */ See, generally, application of appellant (A.17-21) and letter of Hospital (A. 38-41). It was organized in order to provide the citizens of New York with a medical facility whereby emergency treatment could be administered to a victim at the scene, particularly in severe trauma and cardiac arrest cases. It has been noted that New York City alone has more persons suifering from heart disease than the 49 other states in the Union and that each year approximately

*/ As documented by the Medical Society of the County of New York, the New York Hospital Paramedic Program is the only one of its kind in Manhattan (A.47).

25,000 New York City residents die from sudden cardiac arrest (A.62,63). The experience of the Hospital and the paramedics, themselves, documents that proper on-the-scene medical treatment as opposed to mere ambulance transportation to a hospital has often meant the difference between life and death. In fact, the paramedic program under the direction of appellant has attained what was expected of it and is in the process of being expanded (A.38-41).

The program as it is now being implemented provides for paramedics to respond to the scene of an emergency, to report in to appellant by radio-telephone and to have transmitted at the same time an electrocardiogram of the victim, and then to administer such drugs and treatment, including defibrillation,as may be prescribed by appellant. Once the patient is stabilized he is then transported to the hospital under constant care (A. 18,38, 42-43).

The success of the paramedic program is dependent upon properly trained paramedics, an effective communication system, proper equipment and a physician capable of administering the program and directing on-the-scene medical treatment by the paramedics. The paramedic must be specially trained and be certified by New York State as an advanced medical technician. There are only approximately 25 paramedics in the New York City area (A. 69). */ The physician in charge of the program

*/ Los Angeles has over 300 and Seattle over 200 (A.69). Appellant has been instrumental in organizing training programs to augment this pathetic number of paramedics (A. 19).

must have specialized training. He must have Board-certification in internal medicine and cardiology, certification by the American Heart Association as an advanced instructor in basic and advanced life-support systems, knowledge of emergency cardiac technique systems, experience in emergency medical care and the ability to direct paramedics, conduct training programs for them and set up systems so that their skills may be utilized. He must have familiarity with telemetry bio-communication systems and experience in administering hospital programs (A.50). Appellant met this criteria.

2. Prior History of the Program

The Paramedic Program was organized by the Hospital in 1972 (A.38,48). However, until appellant assumed the position of full-time Director, late in 1975, the Hospital had been unable to find a physician qualified and willing to fill the position (A. 40-50). Initially the program was organized under the joint direction of Dr. Joseph Hayes and Christina Haas, a clinical instructor in nursing at New York Hospital. Both of these individuals had other full-time responsibilities at the Hospital and could only work on the program on a part-time basis (A.48). In June, 1973, almost a year after the program had been initiated,the Hospital determined that the program was not dispensing the care intended because of the lack of a full-time director and efforts were initiated to find one (A. 49). In

February, 1974, the Medical Committee of the Board of Trustees of New York Hospital made the following finding:

> "Fixed medical responsibility must be established, preferably resting in one individual ... medical coverage of paramedic runs must be changed ... the current system is and has been unsatisfactory, and even detrimental to the paramedic program ... constant availability of physicians is essential."

(A. 49)

In March, 1974, a committee was appointed to oversee the running of the program "until a full-time director should be appointed" (A. 49). Yet no director was found and in August 1974, according to the Chief of Cardiology "the paramedic program began to deteriorate further" (A. 49). The program was reevaluated and this time the following recommendation was made:

> "Paramedic service should be immediately suspended because of inadequate and inconsistent medical direction, evaluation and follow-up, as well as inadequate numbers of paramedics...."

(A.49)

The paramedic program apparently continued to limp along until plaintiff took over responsibility for the program in or about October 1975. Thus from 1972 to 1975, a period of three years, New York Hospital was unable to find a full-time director for the program.

3. Appellant's Contribution to the Paramedic Program

Appellant has made a significant contribution to the administration and operation of the paramedic program, attested to by a paramedic, Frederick Hewitt (A. 66-70) and the Acting Head of the Cardiology Department of New York Hospital, Dr. Stephen Scheidt (A.42-43) and the Executive Associate Director of New York Hospital, Dr. Melville Platt (A. 38-41). Appellant has been responsible for the following improvements in the New York Hospital Paramedic program:

(a) Appellant assumed responsibility for administering the program so that the proper equipment would be available and so that properly trained paramedics could respond where needed. Since appellant came into the program the number of calls to which the service responded significantly increased and the number of lives saved increased, as well (A. 17-18, 38,69). */

(b) Appellant instituted a continuing education program for the paramedics. This enabled the paramedics to use such life-saving techniques as the esophageal airway to prevent aspiration by the victim, and the administering of necessary drugs (A. 67-69). This program has been extended and in the Fall, if appellant is available, training will be available to paramedics and other interested and qualified persons outside of the New York Hospital complex (A. 19,46).

*/ Since appellant took over the program the number of calls that the paramedics have responded to have increased from 5 to over 20 to 30 per week (A.17).

(c) Appellant developed a system to permit the physician and the paramedic to communicate immediately without the need for either asking irrelevant questions or engaging in needless conversation while a victim's life hangs in the balance. This system is described in detail as an exhibit to appellant's application (A. 19-20). It specifies exactly what procedures a paramedic was to use, how he was to report, what priority system was to be involved. As a result of this system, the paramedic was capable of becoming "the eyes and ears of the physician" so that proper therapy could be ordered. Because of the training instituted by Dr. Ornato, the paramedics were able to become the "hands" of the physician even to the extent of giving intracardiac injections (A.68).

(d) Appellant became the physician to whom the paramedics would report on a 24-hour basis when responding to critical cases requiring immediate medical intervention, particularly with regard to those victims suffering from cardiac arrest. It had been the experience of the Hospital, as well as the paramedics, that rotating cardiologists,whether attending physicians or residents, were unable to work effectively as a team with the paramedics and to give the instantaneous direction by radio contact for on-the-scene treatment (A. 39). Appellant was able to fill this void personally and was involved innumerous times with directing paramedics in their life-saving activity to victims who, but for the effective operation of the system, would be dead today (A.69).

(e) Appellant became involved in the Regional Emergency Medical Services Council of New York City where he provided training and helped integrate the New York Hospital Program with the other emergency treatment systems of New York City. Since there are approximately only 25 paramedics actively engaged in emergency programs in the City of New York, appellant's involvement in training programs with the Regional Emergency Medical Services Council was particularly important (A.45).

4. Inability to Replace Plaintiff

Appellant's application demonstrates that since 1972 he had been the only full-time director that New York Hospital has ever been able to find willing and able to undertake the operation of the Paramedic Program. It is undisputed that the Paramedic Program is a unique form of medical care only recently being developed in communities around the United States and there are few physicians with experience and qualifications in it. According to the Chairman of the Regional Emergency Medical Services Council for New York City:

> "I cannot impress upon you more strongly the dearth of physicians with the qualifications to train paramedic treams."
>
> (A.64)

The Secretary of the New York County Medical Society stated:

> "Although our Society has many cardiologists, Dr. Ornato is the only one we are aware of who is trained to direct a paramedic team program of this type."
>
> (A.47)

This dearth of qualified physicians able to replace appellant is substantiated further by the lack of training pro-

grams available in this area. According to the Chief of Cardiology at Mt. Sinai School of Medicine:

> "In general, I find that a standard cardiology fellowship program does not acquaint the trainee with many of the techniques needed for a paramedic service. Thus, an additional training period of perhaps six months to one year would be necessary to qualify an individual for this type of position." */

(A.71)

According to the summary by the Recorder before the United States Army Delay and Exemption Board, it was stated that:

> "... while many cardiologists practice in area, Dr. Ornato is the only one who is trained to direct a paramedic program. The only one of its kind in Manhattan -- there is no doctor in the area with similar qualifications to take his place without extensive training period."

(A.55)

No other evidence was introduced at the hearing by the Army to counterbalance this fact in any way.

In response to the request by the U.S. Army for information on the qualifications necessary to fill appellant's position, New York Hospital set forth very specific criteria (A.50). Training in cardiology is only one facet of the essential qualifications (A.50).

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*/ In fact, according to the American Journal of Cardiology, only 1.8% of a cardiologist's professional experience is directed to the area of emergency care (A. 63).

5. Action by the United States Army

Appellant's completed application was filed in April, 1976. Thereafter, the U.S. Army wrote back to appellant indicating that it desired further specific information as to the experience of New York Hospital in trying to find a replacement for appellant and the qualifications necessary for a physician to take over appellant's responsibilities (A. 82). New York Hospital replied in detail (A. 48).

Thereafter appellant's case was considered by the U.S. Army Delay and Exemption Board. A Reporter's summary was prepared of the documentation and evidence before the Board (A. 53-56) and a decision was reached by the Board denying appellant's application for the following reasons:

> "1. Other cardiologists in the New York Metropolitan Area could have been and could be trained to fill Dr. Ornato's positions.
>
> 2. Therefore, whether or not other persons are willing to assume those positions and whether or not the community wishes to allocate the funds necessary to attract and train a replacement are matters of the internal traits and policies of the New York Metropolitan Area generally and Manhattan specifically.
>
> 3. Consequently, Dr. Ornato can be replaced and other persons can perform his services within the terms of paragraph 2-19A A.R. 601-25."
>
> (A.55)

Appellant and New York Hospital thereafter filed appeals from this decision (A. 57,80) and this appeal was denied (A.59).

The Adjutant General approved the findings of the Board and acknowledged that "... New York Hospital has experienced difficulty in recruiting for this position due to limited funds and interested applicants ..." However, he then went on to determine that the concentration of cardiologists in New York City somehow rendered appellant dispensable. No basis in the record was cited for such opinions (A.59). Following the denial of his appeal, appellant instituted the present legal action.

Statement of Law

POINT I

THIS COURT HAS JURISDICTION OVER THE SUBJECT MATTER OF THE CAUSE OF ACTION

Appellant has brought on an action in mandamus seeking to compel the Army to comply with its own rules and regulations in reviewing his request for community hardship exemption under AR 601-25. He asserts that the action by the Army in denying his application was contrary to the meaning and intent of the regulation and so devoid of factual basis as to render it an arbitrary and irrational determination.

In view of such allegations there is ample jurisdiction for this Court to reach the merits of appellant's cause of action. The Army's failure to adhere to its own rules and regulations has long been recognized as a basis for sustaining review by the courts of military action. Smith v. Resor, 406 F.2d 141 (2d Cir.1969). So, too, arbitrary and irrational action is likewise a basis for sustaining review. Nixon v. Secretary of the Navy, 422 F.2d 940 (2d Cir. 1970). As this Court stated:

> "We have recognized, however, that ... official conduct may have gone so far beyond any rational exercise of discretion as to call for mandamus even when the action is within the letter of the authority granted."
>
> [Casarino v. United States, 431 F.2d 775, (2d Cir. 1970)]

The case of Roth v. Laird, 446 F.2d 855 (2d Cir. 1971) does not preclude review by this Court of appellant's cause of action. Roth, itself, acknowledges that failure to adhere to regulation and arbitrary and irrational action warrants review by the courts. Supra, at p. 856. Further, the factual basis of Roth is entirely different from that present in the case at bar.

In considering the distinctions between this case and that of Roth it is important to note that we are not dealing here with a "balancing" of the rights of the individual's versus the nation's need, as was apparently the case in Roth. Rather, the Army in appellant's case has rendered a decision setting forth purported reasons why community hardship status was not granted. It did not state in its reasons that appellant's skills were more critical to the Army or that military necessity required dispensing with the community's needs in favor of the military's. Instead, the decision was couched entirely in the terms of the regulation and therefore must be assessed in that manner.*/ It has been stated:

> "When there is a requirement of law that reasons be stated by executive officials or administrative agencies responsible for decisions, there is an implicit corollary that the decision must stand or fall on the basis of the reasons stated. This is a general doctrine of administrative law."
>
> [United States ex rel Checkman v. Laird, 469 F.2d 773, 780, (2d Cir. 1972)]

*/ The reasons given by the Army were directed to evaluation of the New York Hospital paramedic program and not military needs.

The rationale thus advanced by the United States Army in this case must provide the basis for the denial of plaintiff's application. The government has stated its reasons and is now bound by them. Either they conform to the regulations and to the standards of justice or they fail. It is not for this Court to consider that which the Army Board and the regulations do not provide for.

The situation thus presented in this case is analogous to that noted in Hammond v. Lenfest, 398 F. 2d 705 (2d Cir. 1968) where the Court noted that while the Army need not provide for conscientious objector status, once it has done so the decision must be in conformity with such regulations. See also United States ex rel Brooks v. Clifford, 409 F. 2d 700 (4th Cir. 1970). So, too, where the Army has set down regulations providing for community hardship and codified the standards under which such a claim would be considered, the Army is bound to adhere to those standards and not inject other facts or considerations outside the plain meaning of the regulation.

The regulation enacted by the Secretary of the Army, AR 601-25, provides the standard upon which an application for community hardship exemption is to be measured. According to the regulation an applicant must show that (1) the service he is performing is essential to the health, safety and welfare of the community; (2) that it is not performed by other

physicians, and (3) that prior to the date scheduled to report for active duty he cannot be replaced (A. 114). Upon meeting all these conditions delay "will be granted". The terms of the present regulation are unambiguous and in fact now require granting of community hardship exemption if the conditions set forth are met. Unlike the prior regulation that appears to have been in effect at the time of Roth v. Laird, supra, the regulation does not speak in terms of guidelines or suggested criteria. */

Yet, notwithstanding the unambiguous conditions set forth in the regulation, it is submitted that the Army Delay and Exemption Board failed to adhere to these standards and otherwise acted in an arbitrary and irrational manner.

*/Compare, for instance the language used by the present AR 601-25 ¶2-27 when dealing with personal hardship applications. The regulation sets forth in ¶2-27 "guidance" for determining hardship, but does not set forth the specific standards that appear in the community essentiality section (A. 115).

POINT II

THE ARMY HAS FAILED TO ADHERE TO ITS OWN REGULATIONS AND OTHERWISE ACTED IN AN ARBITRARY MANNER IN CONSIDERING APPELLANT'S APPLICATION FOR COMMUNITY HARDSHIP EXEMPTION

Where the Army has enacted regulations setting forth standards for determining qualifications for community hardship exemption, appellant is entitled to have those standards applied in evaluating his case. Hammond v. Lenfest, supra; Smith v. Kesor, supra. It is submitted that the decision by the Army Delay and Exemption Board (A.53,56) as well as the reviewing authority on appeal (A. 59) demonstrate that the standards of AR 601-25 were not applied as required and that, further, the decision rendered was contrary to the meaning and intent of the regulation and otherwise without factual support or logical conclusion.

A. The reliance on findings with regard to the "internal traits and policies of New York" was irrelevant to the standards set down by AR 601-25.

The most glaring aspect of the Army Delay and Exemption Board's ruling was that there was no community hardship because of the supposed "internal traits and policies of the New York Metropolitan area". A review of 601-25 leaves no doubt that such considerations by the Appeal Board were outside the scope and intent of the regulation. In considering the "in-

ternal traits and policies of New York" the Delay and Exemption Board added a new factor to AR 601-25 not mandated by the regulation. The regulation requires the Board to consider the needs of the citizens and the services being performed and the ability to continue to provide that service at the time of an individual's call to active duty. Yet the Board's findings disregard these standards and substitute, instead, a standard that defies explanation. Somehow the City of New York has certain "internal traits and policies" which, according to the Board, bear on its citizens' right to receive emergency medical care. At the very least it is a statement without logic, and at the very worst, an insult and a slur that is ill-befitting the military.

The Board's use of such a standard, as indicated by its own decision, is proof of the failure of the Board to apply the correct standard in evaluating appellant's application. The regulation sets forth a standard and the Board is not free to roam about setting its own criteria and ignoring those set by the Secretary of the Army. Discretion is not a license to disregard the rules and regulations promulgated by those in authority. Hammond v. Lenfest and Smith v. Resor, supra. Implementation of a regulation must be both in substance as well as form. Thus this Court has held, in the case of Rohe v. Froehlke, 500 F. 2d 111 (2d Cir. 1974) that where a regulation provides for an appeal, the regulations intend that the appeal be a meaningful one. Compliance with

a regulation must not be mere rote application aimed towards satisfying the form but not the spirit of the law. As one court has stated:

> "We think the Army's own directives demonstrate a policy of reasonable common sense fairness to its soldiers -- which policy has not been followed in this case."
>
> [United States ex rel Tobias v. Laird, 413 F.2d 936, 940 (4th Cir. 1969)]

Such "commonsense fairness" and fair application of the meaning and intent of the regulations is likewise applicable to this Court's rulings in Feliciano v. Laird, 426 F.2d 424 (2d Cir.1970), at p. 428, and United States ex rel Donham v. Resor, 436 F.2d 751 (2d Cir. 1971) [where the Court found that the hearing officer "lacked the necessary objectivity to be a fair, knowledgeable hearing officer"] (at p. 754).

In the case at bar the findings by the Board with regard to the internal traits and policies of New York do not exhibit that "commonsense fairness" and "necessary objectivity" that the regulation envisioned. The Board has thus exceeded its authority and deprived appellant of his right to fair consideration of his application for community hardship exemption.

B. The finding that doctors "could be trained" at some future time does not satisfy the requirements of AR 601-25.

The regulation requires that appellant's application be evaluated in terms of community need, alternative services

available and ability to replace appellant "prior to the date scheduled to report for active duty" (¶2-19a(3)). Yet both the Board and the reviewing authority avoid making such a determination and instead find that physicians "could be trained to fill Dr. Ornato's position" (A.53, 59). The future ability to train physicians, if available, to replace appellant is not a prerequisite under the regulation. Instead, the purpose of the regulation is to insure that ongoing essential services are not disrupted.*/ Yet reference to what physicians could be trained in the future would in no way insure non-disruption of appellant's essential program.

The fact that neither the reviewing authority nor the Board could make a finding that "appellant can be replaced prior to the date scheduled to report for active duty" is indicative of the evidence submitted. For, in fact, there is no rebuttal to the evidence that at the present time there is no replacement for appellant. Upon his leaving for Ft. Eustis, Virginia, the program will be destroyed (A.80). Therefore, the difference between the tenses "can" and "could" are not mere games in semantics but, rather, are truly indicative of the misapplication by the Board of the standards contained in AR 601-25. The Board, by resorting to the future tense, concedes appellant's essentiality.

*/ See Hutcheson v. Hoffman, 439 F.2d 821 (5th Cir. 1971) and specifically Judge Tuttle's concurring opinion, at p.824.

C. The decision that appellant did not qualify for community hardship exemption was arbitrary, irrational and unsupported by any evidence.

Appellant's application for community hardship exemption was prima facie sufficient under the standards of the regulation. Thus at the very outset it must be noted that we are not dealing here with circumstances found in cases such as Sofranko v. Froehlke, 346 F.2d 1380 (D.C. Tex. 1972); Turner v. Commander, F. Supp. (N.D. Ohio, Eas.Di . July 16, 1976) and Arnold v. Rumsfeld, F. Supp. (E.D. N.Y. August 3, 1976, Pratt, J,) where the petitioners did not submit an application sufficient on its fact to qualify under the regulations. However, appellant's case is prima facie sufficient. Appellant, by his documentation has shown: (1) that his paramedic program is an essential service to the health, safety and welfare of the New York community; (2) that the paramedic service cannot be replaced by other programs in the community and that appellant's service to the program cannot be substituted by other physicians; and (3) that at the present time and prior to appellant being called to active duty he cannot be replaced by another physician qualified and able to assume directorship of the paramedic program. No evidence adverse to appellant was ever introduced before the Board. The sufficiency of appellant's case under the regulation is best attested to by the Army Recorder's own summary of the evidence

before the Army Delay and Exemption Board (A. 55-56). Considering the case in its entirety then, there is no evidence adverse to appellant which in any way rebuts the sufficiency of his application under the standard set forth by the regulation. Yet the Army determined to disregard this evidence and make speculative findings using standards not contained in the regulation.

The Army cannot simply disregard the evidence submitted pursuant to regulation as this Court, in Feliciano noted:

> "It seems clear that the Army similarly must within limits of credibility, assume the facts and application are true when making its initial scrutiny of the request."
>
> [Feliciano v. Laird, supra, p. 428; Cf. Bluth v. Laird, 435 F.2d 1065 (4th Cir. 1970)]

The same requirement and logic must apply to the Army's evaluation of appellant's application.

Both the Delay and Exemption Board and the reviewing authority determined that other cardiologists could replace appellant, totally disregarding the voluminous evidence in the file. Yet this ignores the evidence in the file and a statement by no less an authority than the New York Medical Society that:

> "Although our Society has many cardiologists, Dr. Ornato is the only one that we are aware of who is trained to direct a paramedic team of this type." (A.47)

Further, the Army specifically requested that additional information be furnished on what qualifications are necessary for a physician to replace appellant as director of the paramedic program (A. 82). New York Hospital responded setting forth precise requirements that go far beyond mere qualification in cardiology (A. 48-51). Other eminent authorities likewise agree that training in cardiology, only, would not suffice (A. 71).

The lack of evidence to support the conclusions of the Army renders the decisions made by them arbitrary and irrational. There must be some basis, some fact, upon which the Army can base its decision in logic or fact, which it is submitted, is lacking here.

In fairness and in the proper implementation of the regulation there must be some obligation on the part of the Army, in order to deny a prima facie application, to have some evidence in support of that denial. In fact, the regulation in a manner similar to that in Feliciano permits the Army to contact the Chairman of the National Advisory Board to the Selective Service to get information in "unusual cases requiring assistance to determine the essentiality of an applicant ...." (See Brief, supra, at page iii). No such action was taken by the Army in this case. Appellant has thus been deprived of fair consideration of his application under the regulations.

Conclusion

For all the foregoing reasons appellant respectfully requests that the denial of a preliminary injunction be reversed and that this case be remanded to the District Coort with direction that the application be remanded to the United States Army for proper processing in conformity with the decision herein.

Respectfully submitted,

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September 8, 1976

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